Malayan Banking Bhd v Karnival Dagang Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-3221 OF 2010
RAUS SHARIF PCA, LOW HOP BING AND ANANTHAM KASINATHER JJCA
13 JUNE 2012

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Civil Procedure — Summary judgment — Action to recover monies loaned — Banking facilities — Default in repayments of banking facilities — Proposal of repayment arrangement to settle indebtedness by instalments — Default of proposal of repayment arrangement — Summary judgment for sum borrowed with interest at 1.75%pa above base lending rate and costs — Whether bank's claim premature — Interest and outstanding sum — Whether dispute between borrower and third party relevant to borrower's liability to pay outstanding sums

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The appellant ('the bank') had granted various banking facilities ('the facilities') to the first respondent ('the borrower') which were guaranteed by the second to sixth respondents ('the guarantors'). The borrower then defaulted in making repayments of the facilities and was issued with a series of letters of demand. The borrower responded and informed the bank of its inability to make prompt repayments due to problems and losses in its project and instead proposed a repayment arrangement to settle the indebtedness by instalments, of which the bank accepted. However, the borrower still failed to adhere to the agreed repayment terms and letters of demand were again issued. The bank then proceeded to apply for summary judgment in the sum of RM3,117,802.53, together with interest at 1.75%pa above the base lending rate and costs, under O 14 of the Rules of the High Court 1980 ('RHC'), against the borrower and the guarantors. The issues that arose for consideration concerned the issue of whether the bank's claim was premature; interest and outstanding sum; and the dispute between the borrower and the third party.

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Held, allowing the appeal with costs fixed at RM10,000:

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(1) There was no merit in the borrower's contention that the bank's claim was premature. Clause 2.3 of the facilities agreement expressly states that 'Notwithstanding anything to the contrary, the Facilities herein are repayable on demand and subject to yearly review irrespective of whether or not an Event of Default has occurred …'. This clause entitled the bank to invoke the rights to demand and recover the facilities whether or not there was any default. The bank's case was even stronger here as the borrower had failed to observe its repayment obligations diligently. It was therefore appropriate for the bank to demand and recover the facilities.

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Moreover, the absence of any challenge or dispute by the borrower, and the bank's acceptance of the borrower's proposal to settle the indebtedness, spoke volumes against the borrower (see paras 9–10).

(2) The letter issued by the bank expressly stated that the interest rate applicable to the term loan was 1.75%pa above the bank's base lending rate debited on a half yearly basis, to which all the contracting parties have expressly agreed in the facilities documents. This interest was duly reflected in the certificate of indebtedness as final and conclusive evidence of the amount due and payable under the facilities, which the borrower had expressly agreed in cl 23.1 of the facilities agreement and the guarantors have agreed in cl 11 of the guarantee. The sums stipulated in the certificate bound them in the absence of any manifest error, which the borrower and the guarantors were unable to show (see para 11).

(3) It was completely irrelevant to the borrower's liability to pay the outstanding sums pursuant to the facilities documents. The transactions between the bank and the borrower and the guarantors arose from a banker-customer relationship. The disputes, if any, between the borrower and other parties have nothing to do with the bank. Those disputes could not affect the liability of the borrower and the guarantors to repay the facilities. These disputes were raised as red herrings and were not triable issues (see para 12).

[Bahasa Malaysia summary

Perayu ('bank') telah memberikan beberapa kemudahan perbankan ('kemudahan') kepada responden pertama ('peminjam') yang mana dijamin oleh responden kedua hingga keenam ('penjamin-penjamin'). Peminjam kemudiannya telah ingkar dalam membuat pembayaran kemudahan tersebut dan telah diserahkan surat tuntutan berturut-turut. Peminjam menjawab dan memberitahu bank ketidakmampuannnya untuk membuat pembayaran balik dengan segera akibat masalah dan kerugian dalam projek-projeknya dan sebaliknya mencadangkan penyusunan pembayaran balik untuk menyelesaikan hutang melalui bayaran ansuran, yang mana bank menerimanya. Walau bagaimanapun, peminjam masih gagal untuk mengikut kepada terma pembayaran balik yang dipersetujui dan surat tuntutan sekali lagi dikeluarkan. Bank kemudiannya meneruskan untuk memohon penghakiman ringkas dalam jumlah RM3,117,802.53, bersama faedah pada 1.75% setahun atas kadar pinjaman asas dan kos, di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), terhadap peminjam dan penjamin-penjamin. Isu-isu yang berbangkit untuk pertimbangan adalah berkenaan isu sama ada tuntutan bank adalah pramatang; faedah dan jumlah tertunggak; dan pertikaian di antara peminjam dan pihak ketiga.

Diputuskan, membenarkan rayuan dengan kos ditetapkan pada RM10,000:

(1) Tidak terdapat merit di dalam hujahan peminjam bahawa tuntutan bank

adalah pramatang. Klausa 2.3 perjanjian perbankan secara nyata menyatakan bahawa 'Notwithstanding anything to the contrary, the Facilities herein are repayable on demand and subject to yearly review irrespective of whether or not an Event of Default has occurred …'. Klausa ini memberikan bank hak untuk membangkitkan hak-hak untuk menuntut dan mendapatkan kembali kemudahan sama ada atau tidak terdapat apa-apa pengingkaran. Kes bank adalah lebih kukuh di sini kerana peminjam gagal untuk membayar balik tanggungjawabnya secara teliti. Oleh itu adalah wajar untuk bank menuntut dan mendapatkan kembali kemudahan tersebut. Lagipun, ketiadaan apa-apa bantahan atau pertikaian oleh peminjam, dan penerimaan bank terhadap cadangan peminjam untuk menyelesaikan hutang tersebut, menunjukkan peminjam tidak berbuat apa-apa (lihat perenggan 9–10).

(2) Surat yang dikeluarkan oleh bank menyatakan secara jelas bahawa kadar faedah kepada pinjaman bertempoh adalah 1.75% setahun atas kadar pinjaman asas didebitkan atas asas setiap setengah tahun, di mana kesemua pihak-pihak yang memasuki kontrak telah secara nyata bersetuju dalam dokumen-dokumen kemudahan tersebut. Faedah ini dinyatakan di dalam sijil keberhutangan sebagai bukti akhir dan muktamad jumlah yang belum dibayar di bawah kemudahan tersebut, di mana peminjam secara nyata bersetuju di dalam klausa 23.1 perjanjian kemudahan dan penjamin-penjamin telah bersetuju dalam klausa 11 jaminan tersebut. Jumlah yang dinyatakan di dalam sijil mengikat mereka dalam ketiadaan apa-apa kesilapan yang nyata, yang mana gagal dijelaskan oleh peminjam dan penjamin-penjamin tersebut (lihat perenggan 11).

(3) Adalah tidak relevan sama sekali kepada liabiliti peminjam untuk membayar jumlah tertunggak berikutan dokumen-dokumen perbankan. Transaksi di antara bank dan peminjam-peminjam berbangkit daripada hubungan bank-pelanggan. Pertikaian-pertikaian tersebut, jika terdapat, di antara peminjam dan pihak-pihak lain tidak mempunyai apa-apa hubungan dengan bank. Pertikaian-pertikaian tersebut tidak boleh menjejaskan liabiliti peminjam dan penjamin-penjamin untuk membayar balik kemudahan tersebut. Pertikaian-pertikaian ini dibangkitkan sebagai niat untuk mengelirukan dan bukan isu-isu yang boleh dibicarakan (lihat perenggan 12).]

Notes

For cases on action to recover monies loaned, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8201–8204.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

A *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, FC (refd)

Legislation referred to
Rules of the High Court 1980 O 14

B **Appeal from:** Suit No AT2–22–1420 of 2009 (High Court, Shah Alam)

Ng Sai Yeang (Norazmi bin Norazman with her) (Raja, Darryl & Loh) for the appellant.
T Gunaseelan (Gunaseelan & Associates) for the respondent.

C **Low Hop Bing JCA (delivering judgment of the court):**

APPEAL

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[1] The appellant ('the bank') had applied for summary judgment in the sum of RM3,117,802.53, together with interest at 1.75%pa above the base lending rate and costs, under O 14 of the Rules of the High Court 1980, against the first respondent as the borrower ('the borrower') and the second to the sixth
E respondents as guarantors ('the guarantors').

[2] The bank's application was dismissed by the High Court. This is the bank's appeal against the High Court decision.

F THE FACTUAL BACKGROUND

[3] The bank granted various banking facilities (collectively, 'the facilities') to the borrower. The facilities were secured by, inter alia, a deed of assignment. In
G addition, the guarantors also executed guarantees in favour of the bank to secure repayment of the facilities.

[4] Throughout the entire period during which the borrower utilised the facilities, the borrower had never raised any dispute or complaint.

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[5] When the borrower defaulted in making repayments of the facilities, the bank's solicitors issued demand letters in 2007. The borrower responded and informed the bank of its inability to make prompt repayments, due to problems and losses in the project with Petronas Carigali Sdn Bhd ('Petronas').

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[6] The bank accepted the borrower's proposal for a repayment arrangement to settle the indebtedness by instalments. However, the borrower still failed to adhere to the agreed repayment terms. The bank's solicitors issued further demand letters in 2008.

[7] It was not disputed that the debt was at all times due and payable by the borrower to the bank. The borrower remained in default, being still unable to pay the re scheduled instalments.

[8] Prior to the bank's commencement of the action, the borrower and consequently the guarantors had never questioned the outstanding sums, nor objected to the demands made by the bank. The certificate of indebtedness issued by the bank also remains unchallenged.

WAS THE BANK'S CLAIM PREMATURE?

[9] We find no merit in the borrower's contention that the bank's claim was premature. The borrower's contention runs counter to contemporaneous documents. Clause 2.3 of the facilities agreement dated 9 August 2005 expressly states (at p 120 of the appeal record) that 'Notwithstanding anything to the contrary, the facilities herein are repayable on demand and subject to yearly review irrespective of whether or not an Event of Default has occurred …'. This clause entitles the bank to invoke the rights to demand and recover the facilities whether or not there was any default. The bank's case is even stronger here as the borrower had failed to observe its repayment obligations diligently. It was therefore appropriate for the bank to demand and recover the facilities.

[10] Moreover, the absence of any challenge or dispute by the borrower, and the bank's acceptance of the borrower's proposal to settle the indebtedness, speak volumes against the borrower. We are unable to sustain this contention raised for the borrower.

THE INTEREST AND OUTSTANDING SUM

[11] The letter of demand dated 27 December 2007 issued by the bank's solicitors expressly stated that the interest rate applicable to the term loan was 1.75%pa above the bank's base lending rate debited on a half yearly basis, to which all the contracting parties have expressly agreed in the facilities documents. This interest is duly reflected in the certificate of indebtedness as final and conclusive evidence of the amount due and payable under the facilities, which the borrower has expressly agreed in cl 23.1 of the facilities agreement (at p 151 of the appeal record) and the guarantors have agreed in cl 11 of the guarantee (at p 189 of the appeal record). The sums stipulated in the certificate shall be binding on them in the absence of any manifest error, which the borrower and the guarantors are unable to show: *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 (FC), following *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC).

THE DISPUTE BETWEEN BORROWER AND THIRD PARTY (GE/NP)

[12] The borrower and the guarantors described the bank's knowledge of the disputes existing between the borrower, GE/NP and Petronas as a triable issue. Our view is that it is completely irrelevant to the borrower's liability to pay the outstanding sums pursuant to the facilities documents. The transactions between the bank and the borrower and the guarantors arose from a banker-customer relationship. The disputes, if any, between the borrower, GE/NP and Petronas have nothing to do with the bank. Those disputes cannot affect the liability of the borrower and the guarantors to repay the facilities. With respect, these disputes were raised as red herrings and are not triable issues here.

CONCLUSION

[13] As there is no triable issue, we allow the bank's appeal, enter summary judgment for the bank, with fixed costs at RM10,000 here and below. Deposit to be refunded to the bank as the appellant.

Appeal allowed with fixed costs at RM10,000.

Reported by Afiq Mohamad Noor